CHATEAU DES CHARMES WINES LTD.,
Plaintiff-Appellant,
v.
SABATE USA INC., SABATE S.A.,
Defendants-Appellees.

No. 02-15727

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

328 F.3d 528; 2003 U.S. App. LEXIS 8478; 2003 Daily Journal DAR 4894

March 31, 2003, Argued and Submitted, San Francisco, California
May 5, 2003, Filed

COUNSEL: Benjamin M. Zuffranieri, Jr., Hodgson Russ LLP, Buffalo, New York, for the plaintiff-appellant.
David C. Winton, Law Office of David C. Winton, San Francisco, California, for the defendant-appellee.

JUDGES: Before: Betty B. Fletcher, Alex Kozinski, and Stephen S. Trott, Circuit Judges.

OPINION: PER CURIAM:

Chateau des Charmes Wines, Ltd. ("Chateau des Charmes"), a Canadian company, appeals the dismissal of its action for breach of contract and related claims arising out of its purchase of wine corks from Sabate, S.A. ("Sabate France"), a French company, and Sabate USA, Inc. ("Sabate USA"), a wholly owned California subsidiary. The district court held that forum selection clauses in the invoices that

Sabate France sent to Chateau des Charmes were part of the contract between the parties and dismissed the case in favor of adjudication in France. Because we conclude that the forum selection clauses in question were not part of any agreement between the parties, we reverse.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

The material facts pertinent to this appeal are not disputed.[1] Sabate France manufactures and sells special wine corks that it claims will not cause wines to be spoiled by "cork taint," a distasteful flavor that some corks produce. It sells these corks through a wholly owned California subsidiary, Sabate USA.

In February 2000, after some preliminary discussions about the characteristics of Sabate's corks, Chateau des Charmes, a winery from Ontario, Canada, agreed by telephone with Sabate USA to purchase a certain number of corks at a specific price. The parties agreed on payment and shipping terms. No other terms were discussed, nor did the parties have any history of prior dealings. Later that year, Chateau des Charmes placed a second telephone order for corks on the same terms. In total, Chateau des Charmes ordered 1.2 million corks.

Sabate France shipped the corks to Canada in eleven shipments. For each shipment, Sabate France also sent an invoice. Some of the invoices arrived before the shipments, some with the shipments, and some after the shipments. On the face of each invoice was a paragraph in French that specified that "Any dispute arising under the present contract is under the sole jurisdiction of the Court of Commerce of the City of Perpignan." On the back of each invoice a number of provisions were printed in French, including a clause that specified that "any disputes arising out of this agreement shall

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[1] We, of course, do not determine the merits of Chateau des Charmes's claims against Sabate France and Sabate USA.

be brought before the court with jurisdiction to try the matter in the judicial district where Seller's registered office is located." Chateau des Charmes duly took delivery and paid for each shipment of corks. The corks were then used to bottle Chateau des Charmes' wines.

Chateau des Charmes claims that, in 2001, it noticed that the wine bottled with Sabate's corks was tainted by cork flavors. Chateau des Charmes filed suit in federal district court in California against Sabate France and Sabate USA alleging claims for breach of contract, strict liability, breach of warranty, false advertising, and unfair competition. Sabate France and Sabate USA filed a motion to dismiss based on the forum selection clauses. The district court held that the forum selection clauses were valid and enforceable and dismissed the action. This appeal ensued.

DISCUSSION

I.

Although we review a district court's decision to enforce a forum selection clause for abuse of discretion, *Kukje Hwajae Ins. Co., Ltd. v. M/V Hyundai Liberty*, 294 F.3d 1171, 1174 (9th Cir. 2002), whether the parties agreed to a forum selection clause is a question of law that we review de novo. *Cf. Helash v. Ballard*, 638 F.2d 74, 75 (9th Cir. 1980) (per curiam) (existence of contract based on undisputed facts is a question of law).[2]

The question before us is whether the forum selection clauses in Sabate France's invoices were part of any agreement between the parties. The disputes in this case arise out of an agreement for a sale of goods from a French party and a United States party to a Canadian party. Such international sales contracts are ordinarily governed by a multilateral treaty, the United Nations Convention on Contracts for the International Sale of Goods ("C.I.S.G."),

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[2] Whether we review under an abuse of discretion standard or a de novo standard, we reach the same conclusion.

which applies to "contracts of sale of goods between parties whose places of business are in different States . . . when the States are Contracting States." C.I.S.G., art. 1(1)(a), 15 U.S.C. App., 52 Fed. Reg. 6262 (March 2, 1987). The United States, Canada, and France are all contracting states to the C.I.S.G. 15 U.S.C. App. (Parties to the Convention). And none has acceded to the Convention subject to reservations that would affect its applicability in this case. Moreover, because the President submitted the Convention to the Senate, which ratified it, *see* Public Notice 1004, U.S. Ratification of 1980 United Nations Convention on Contracts for the International Sale of Goods: Official English Text, reprinted in 15 U.S.C. App.; Letter of Transmittal from President Reagan to the Senate of the United States (Sept. 21, 1983), reprinted in 15 U.S.C. App., there is no doubt that the Convention is valid and binding federal law. Accordingly, the Convention governs the substantive question of contract formation as to the forum selection clauses.

Our conclusion that the C.I.S.G. governs the issues in this appeal is not in conflict with authority from our sister circuits that have applied state law. Both the Second Circuit and the First Circuit have confronted the question of what law governs issues of contract formation that are antecedent to determining the validity of and enforcing forum selection clauses. In *Evolution Online Sys. Inc. v. Koninklijke Nederland N.V., KPN*, 145 F.3d 505, 509 (2d Cir. 1998), the Second Circuit applied New York law to a dispute between a Dutch company and a New York corporation regarding the production of computer software and the provision of technical services presumably because the Convention does not apply "to contracts in which the preponderant part of the obligations of the party who furnishes the goods consists in the supply of labor or other services." C.I.S.G., art. 3(2). The First Circuit's decision in *Lambert v. Kysar*, 983 F.2d 1110, 1119 (1st Cir. 1993), involved the resolution of an interstate dispute that had no international dimension.

II.

Under the C.I.S.G., it is plain that the forum selection clauses were not part of any agreement between the parties. The Convention sets out a clear regime for analyzing international contracts for the sale of goods: "A contract of sale need not be concluded in or evidenced by writing and is not subject to any other requirement as to form." C.I.S.G., art. 11. A proposal is an offer if it is sufficiently definite to "indicate[] the goods and expressly or implicitly fix[] or make[] provision for determining the quantity and the price," *id.*, art. 14, and it demonstrates an intention by the offeror to be bound if the proposal is accepted. *Id.* In turn, an offer is accepted if the offeree makes a "statement . . . or other conduct . . . indicating assent to an offer." *Id.*, art. 18. Further, "A contract is concluded at the moment when an acceptance of an offer becomes effective." *Id.*, art. 23. Within such a framework, the oral agreements between Sabate USA and Chateau des Charmes as to the kind of cork, the quantity, and the price were sufficient to create complete and binding contracts.[3]

The terms of those agreements did not include any forum selection clause. Indeed, Sabate France and Sabate USA do not contend that a forum selection clause was part of their oral agreements, but merely that the clauses in the invoices became part of a binding agreement. The logic of this contention is defective. Under the Convention, a "contract may be modified or terminated by the mere agreement of the parties." *Id.*, art. 29(1). However, the Convention clearly states that "[a]dditional or different terms relating, among other things, to . . . the settlement of disputes are considered to alter the terms of the offer materially." *Id.*, art. 19(3). There is no indication that Chateau des Charmes

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[3] In this respect, the regime of the C.I.S.G. differs from that of the Uniform Commercial Code, which would require a contract for the sale of corks for the value involved here to be evidenced by a writing. *See* U.C.C. § 2-201.

conducted itself in a manner that evidenced any affirmative assent to the forum selection clauses in the invoices. Rather, Chateau des Charmes merely performed its obligations under the oral contract.

Nothing in the Convention suggests that the failure to object to a party's unilateral attempt to alter materially the terms of an otherwise valid agreement is an "agreement" within the terms of Article 29. *Cf.* C.I.S.G., art. 8(3) ("In determining the intent of a party or the understanding a reasonable person would have had, due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties."). Here, no circumstances exist to conclude that Chateau des Charmes's conduct evidenced an "agreement." We reject the contention that because Sabate France sent multiple invoices it created an agreement as to the proper forum with Chateau des Charmes. The parties agreed in two telephone calls to a purchase of corks to be shipped in eleven batches. In such circumstances, a party's multiple attempts to alter an agreement unilaterally do not so effect. *See In re CFLC, Inc.*, 166 F.3d 1012, 1019 (9th Cir. 1999).

CONCLUSION

Because the contract for the sale of corks did not contain the forum selection clauses in Sabate France's invoices, there was nothing for the district court to enforce, and its dismissal of this action was an abuse of discretion. The action is reinstated.

REVERSED and REMANDED.

CHATEAU DES CHARMES WINES LTD.,
Plaintiff,
v.
SABATE USA, INC., AND SABATE S.A.,
Defendants.

CASE NUMBER: C-01-4203 MMC

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

2002 U.S. Dist. LEXIS 4406

March 12, 2002, Decided
March 12, 2002, Filed; March 14, 2002, Entered in Civil Docket

ORDER GRANTING DEFENDANTS' MOTION TO DISMISS

(Docket No. 9)

Before the Court is defendants Sabate USA, Inc. ("Sabate USA") and Sabate S.A.'s ("Sabate France") motion to dismiss, filed December 11, 2001, pursuant to Rule 12(b)(3) of the Federal Rules of Civil Procedure and 28 U.S.C. §§ 1404 and 1406. Having considered the papers filed in support of and in opposition to the motion, the Court finds the matter appropriate for decision on the papers, VACATES the hearing scheduled for February 22, 2002, and rules as follows.

BACKGROUND

The instant action arises from the sale of cork-based closures used in bottling wine. Plaintiff Chateau des Charmes Wines Ltd., a Canadian wine maker, allegedly purchased cork-based closures from defendants, in eleven separate

shipments, based on defendants' representations that such closures were of high quality and would not "taint" the wine with undesirable aromas and flavors. (*See* Compl. ¶¶ 11, 22, and 24.) Plaintiff alleges that, contrary to defendants' representations, defendants' closures damaged the smell, character and drinkability of plaintiff's wines. (*See id.* ¶ 28.)

Plaintiff alleges six causes of action: (1) Breach of Express Warranty, (2) Breach of Implied Warranties, (3) Breach of Contract, (4) Misrepresentation, (5) Strict Liability/Negligence, and (6) Violation of False Advertising and Practices Statutes, Cal. Bus. & Prof. Code § 17200, et. seq., and § 17500, et. seq.

LEGAL STANDARD

Rule 12(b)(3) provides that a complaint may be dismissed for "improper venue." *See* Fed. R. Civ. Proc. 12(b)(3). When deciding a motion to dismiss under Rule 12(b)(3), unlike a motion to dismiss under Rule 12(b)(6), the Court need not accept the pleadings as true and may consider facts outside the pleadings. *See R.A. Argueta v. Banco Mexicano, S.A.*, 87 F.3d 320, 324 (9th Cir. 1996). The facts, however, "must be viewed in the light most favorable to plaintiff" and "disputed fact[s] may be resolved in a manner adverse to the plaintiff only after an evidentiary hearing." *See New Moon Shipping Co. v. Man B & W Diesel AG*, 121 F.3d 24, 29 (1997). Where the material facts are undisputed, the Court need not hold a hearing. *See id.*; *K.K.D. Imports, Inc. v. Karl Heinz Dietrich GmbH & Co.*, 36 F. Supp. 2d 200, 203 (1999).

28 U.S.C. § 1404(a) provides: "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." *See* 28 U.S.C. § 1404(a). 28 U.S.C. § 1406(a) provides: "The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could

have been brought." *See* 28 U.S.C. § 1406(a). Where the proper venue is located in a foreign country, federal courts lack authority to transfer the action and therefore must dismiss it for improper venue. *See Allen v. Lloyd's of London*, 94 F.3d 923, 932 (4th Cir. 1999) (requiring dismissal where parties selected United Kingdom pursuant to forum selection clause).

DISCUSSION

Defendants assert that plaintiff's complaint should be dismissed based on the forum selection clause contained in the invoices sent to plaintiff in connection with each shipment.[1] The invoices in question contain two similar forum selection clauses, both written in French.[2] On the

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[1] Plaintiff asserts that although the first invoice was received concurrently with the first shipment of corks, subsequent invoices arrived either before or after the shipment. (See Decl. of Pierre-Jean Bosc ¶¶ 18, 19; Lucenti Decl. ¶ 3; Opp'n at 3.) Differences with respect to when the invoices arrived, however, are not material to the instant dispute. *See K.K.D. Imports*, 36 F. Supp. 2d at 202 (holding party bound by forum selection clause received after shipment where party received identical invoices with prior shipments). Nor is it material that after a dispute arose between the parties, defendant Sabate USA sent plaintiff second copies of three invoices, which copies did not included the terms at issue, as it is undisputed that the invoices received by plaintiff in the normal course of business contained those terms. (*See* Lucenti Decl. Exh. A.)

[2] In their initial moving papers, defendants mistakenly relied upon a more recent invoice form rather than the form sent to plaintiff. Although the forum selection language contained on the front of the invoice remains unchanged, language on the back of the invoice was modified. As noted, the invoices sent to plaintiff contain a forum selection clause that applies to "any claims relating to the performance or the interpretation of this agreement." (See Chaurand Decl. Exh. ¶¶ 15). The more recent invoice states that the forum selection clause applies to "any disputes arising out of this

front of each invoice, a forum selection clause, translated into English, states: "Any dispute arising under the present contract is under the sole jurisdiction of the Court of Commerce of the City of Perpignan. (*See* Rosen Decl. Exh. 2.) The back of each invoice contains a similar clause which, translated into English, states: "For any claims relating to the performance or the interpretation of this agreement, the Commercial Tribunal of Perpignan will have sole jurisdiction."[3] (*See* Chaurand Decl. Exh. B.)

Forum selection clauses are presumptively valid and will be enforced unless the party opposing the clause can "clearly show that enforcement would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching." *See The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15 (1972). The "concern of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes" strongly favor enforcement of forum selection clauses in international contracts. *See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 629 (1985); *see also In Re Oil Spill by Amoco Cadiz*, 659 F.2d 789, 795 (7th Cir. 1981) (holding "special deference [is] owed to forum-selection clauses in international contracts"). The enforceability and interpretation of forum selection clauses are governed by federal law. *See Manetti-Farrow v. Gucci America*, 858 F.2d 509, 513 (9th Cir. 1988).

Plaintiff asserts that its claims should not be dismissed because (1) the forum selection clause is invalid; (2) the forum selection clause, if valid, should not be enforced under the facts presented in this case; and (3) plaintiff's claims

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agreement." (*See* Voss Decl. Ex. 1.) These differences are not material to a determination of the issues presented.

[3] The two clauses will be collectively referred to as the "forum selection clause" where their differences are not significant to the Court's analysis.

against Sabate USA and plaintiff's statutory and tort claims against Sabate France are not subject to the forum selection clause.

A. Enforceability of the Forum Selection Clause

1. Contract Formation

Plaintiff pleads in its complaint that plaintiff and defendants entered into "one or more oral agreements, supported by written invoices, pursuant to which plaintiff agreed to purchase and defendants agreed to sell" the cork closures in question. (*See* Compl. ¶ 52.) Plaintiff now argues that the forum selection clause contained in those invoices is invalid, as the parties never discussed, negotiated or explicitly agreed to a forum-selection clause. (*See* Opp'n at 5; Pierre-Jean Bosc Decl. ¶ 16.) Plaintiff's argument is unavailing. It is well established that a non-negotiated forum selection clause included in a form contract may be enforced even if it was not the subject of bargaining.[4] *See Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 593-595 (1991) (enforcing forum selection clause contained on ticket where parties did not negotiate or discuss the clause).

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[4] Plaintiff asserts that the law of Ontario, Canada, rather than Federal law, should govern the question of whether the forum selection clause is part of the parties' agreement "in the first place." (*See* Opp'n at 6.) As noted, however, the enforceability of forum selection clauses is governed by federal law. *See Manetti-Farrow*, 858 F.2d at 513. In that regard, federal courts have not distinguished among the various issues relevant to enforceability. *See id.* (holding interpretation of forum selection clause governed by federal law); *New Moon Shipping*, 121 F.3d 24, 29-32 (applying federal law to determine whether forum selection clause contained in invoices "is a valid part of the contracts"); *K.K.D. Imports*, 36 F. Supp. 2d at 202 (same); *Batchelder v. Kawamoto*, 147 F.3d 915, 919 (9th Cir. 1998) (applying federal law to determine whether plaintiff bound by choice of law clause where plaintiff claimed he never received or consented to clause incorporated by reference in agreement; analogizing choice of law to forum selection).

Moreover, "evidence of a prior course of dealing may establish a party's awareness of and consent to intended contractual terms." *See New Moon Shipping Co. v. Man B & W Diesel AG*, 121 F.3d 24, 31 (2nd Cir. 1997). Here, evidence of plaintiff's prior course of dealing with defendants establishes plaintiff's consent to the forum selection clause. It is undisputed that plaintiff received numerous invoices containing contract terms, including the forum selection clause, and that plaintiff never objected to such terms until the instant dispute arose. (*See* Paul Bosc Decl. ¶ 12.) This tacit acceptance of the terms contained in the invoices demonstrates plaintiff's assent to such terms. *See Pervel Industries, Inc. v. T M Wallcovering, Inc.*, 871 F.2d 7 (2nd Cir. 1989) (holding buyer bound by arbitration clause contained on reverse side of printed order confirmation form where manufacturer had well-established custom of sending such confirmations and buyer retained them without objection).

The fact that the forum selection clause was written in French does not alter the Court's analysis. A party has a duty to read contractual terms even if such terms are written in a foreign language. *See Karlberg European Tanspa, Inc. v. JK-Josef Kratz Vertriebsgesellschaft*, 618 F. Supp. 344, 347 (N.D. Ill 1985) (holding plaintiff bound by forum selection clause written in German where plaintiff did not understand German and parties did not discuss the forum selection clause); *Gaskin v. Stumm Handel GmbH*, 390 F. Supp. 361, 366-367 (S.D. N.Y. 1975) (holding plaintiff bound by contract written in German where plaintiff could not read or understand German).

Accordingly, the Court concludes that plaintiff is bound by the forum selection clause contained in the invoices.

2. Reasonableness of Enforcement

As noted above, forum selection clauses are presumed valid, and will be enforced unless such enforcement would be "unreasonable and unjust, or the clause [is found to be]

invalid for such reasons as fraud or overreaching." *See Bremen*, 407 U.S. at 15.

Here, plaintiff asserts that enforcement of the forum selection clause would be "unreasonable and unjust" for a number of reasons. First, plaintiff argues that it would be unreasonable to enforce the forum selection clause, as only one of the three parties to the instant litigation resides in France. This argument is not persuasive. As noted in the reply, each of the parties resides in a different country and, thus, the perceived inequity would exist regardless of whether the forum selection clause were enforced.

Plaintiff also argues that the agreement in question was negotiated, formed, and performed in Ontario and that Ontario law will "likely" govern plaintiff's breach of contract claims. (*See* Opp'n at 13.) Assuming plaintiff is correct in that regard, plaintiff cites no authority for the proposition that these considerations would render a forum selection clause unenforceable.

Nor has plaintiff demonstrated that enforcement would be unreasonable merely because plaintiff conducts its business in English and the parties negotiated the terms of their agreement in English. As discussed above, forum selection clauses are enforceable even where the clause requires the dispute to be litigated in a forum where one party does not speak the language. *See Karlberg European Tanspa, Inc.*, 618 F. Supp. at 347 (holding plaintiff bound by forum selection clause written in German; requiring plaintiff to litigate in Germany where plaintiff did not understand German and parties negotiated terms in English).

Finally, plaintiff asserts that enforcement of the forum selection clause would impose enormous hardship and inconvenience on plaintiff and its employees. To avoid enforcement of a forum selection clause on the grounds of inconvenience, plaintiff must demonstrate that "trial in the contractual forum will be so gravely difficult and inconvenient that [plaintiff] will for all practical purposes be

deprived of his day in court." *See Bremen*, 407 U.S. at 18. Plaintiff has failed to make such a showing, as plaintiff states only that its business would be "adversely affected" if its employees were forced to travel to France to litigate this dispute.[5] (*See* Opp'n at 14.)

Accordingly, the Court finds that enforcement of the forum selection clause would not be unreasonable or unjust.

B. Scope of the Forum Selection Clause

Plaintiff contends that many of its claims are not subject to dismissal even if the Court enforces the forum selection clause. Specifically, plaintiff asserts that the forum selection clause does not apply to plaintiff's claims against Sabate USA or to plaintiff's tort and statutory claims against Sabate France.

1. Sabate USA

Plaintiff asserts that the forum selection clause is inapplicable to Sabate USA because Sabate USA was not a party to the agreement containing the clause and there is no evidence that either party intended it to be a third party beneficiary. Plaintiff's argument is not persuasive. A valid forum selection clause may both bind and be enforceable by the contracting parties as well as others whose conduct is "so closely related to the contractual relationship" that they "should benefit from and be subject to" the clause. *See Manetti Farrow v. Gucci America*, 858 F.2d at 514 n.5 (upholding dismissal under forum selection clause of claims against non-signatory subsidiary alleged to have fraudulently obtained plaintiff's customer lists in connection with termination of exclusive dealership agreement entered between plaintiff and another subsidiary). Here, Sabate USA is a wholly-owned subsidiary of Sabate France, formed to

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[5] The Court notes that plaintiff's employees will be forced to travel regardless of whether the Court enforces the forum selection clause, as plaintiff chose to litigate the dispute in California rather than in Ontario, where the winery is located.

pursue sales and marketing opportunities on behalf of its parent corporation. (*See* Sabate Decl. ¶ 3.) In the instant action, plaintiff asserts that Sabate USA was "directly involved in the transaction at issue here," as Sabate USA acted as the local contact for the sale of defendants' products in North America and investigated plaintiff's complaint with respect to the performance of defendants' cork closures once a problem was detected. (*See* Decl. of Paul Bosc ¶¶ 6, 9.) Under such circumstances, Sabate USA's conduct was "closely related to the contractual relationship" at issue and the forum selection clause contained therein is applicable to plaintiff's claims against Sabate USA. *See Manetti Farrow*, 858 F.2d at 514 n.5; *Coastal Steel Corp. v. Tilghman Wheelabrator Ltd.*, 709 F.2d 190, 202-204 (3rd Cir. 1983) (holding non-signatory defendant bound by forum selection clause as third party beneficiary where such defendant's involvement in dispute was foreseeable), *overruled on other grounds by Lauro Lines v. Chasser*, 490 U.S. 495 (1989).

2. Statutory and Tort Claims

Plaintiff asserts that the forum selection clause is inapplicable to the statutory and tort claims asserted against Sabate France because such claims do not "arise under" the parties' contract.[6] Plaintiff states no authority in support of this proposition.

"Where the relationship between the parties is contractual, the pleading of alternative non-contractual theories of liability" does not prevent enforcement of a forum selection clause. *See Coastal Steel*, 709 F.2d at 203 (holding "claims such as negligent design, breach of implied warranty, or misrepresentation" subject to dismissal based on forum selection clause). For example, a forum selection clause "can

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[6] As noted, the forum selection clauses at issue state that the Commerical Tribunal of Perpignan will have sole jurisdiction to resolve "any dispute arising under the present contract" and "for any claims relating to the performance or the interpretation of this agreement." (*See* Rosen Decl. Ex. 2; Chaurand Decl. Exh. B ¶ 15.)

be equally applicable to contractual and tort causes of action." *See Manetti Farrow*, 858 F.2d at 514. Whether a forum selection clause applies to non-contractual claims depends on whether resolution of the claims "relates to interpretation of the contract." *See id.* (holding unfair trade practices and other non-contractual claims properly dismissed based on forum selection clause); *Lambert v. Kysar*, 983 F.2d 1110, 1121-22 (1st Cir. 1993) (holding tort claims subject to dismissal based on forum selection clause where tort claims "involve the same operative facts as a parallel claim for breach of contract.")[7]

Here, plaintiff's breach of contract claim is based on defendants' alleged agreement to sell cork closures that were "free of any defects" and that would "eliminate cork taint." (*See* Compl. ¶ 53.) Plaintiff's tort and statutory claims relate to defendant's performance under that contract and involve the same operative facts. Specifically, plaintiff alleges that defendants breached express and implied warranties by selling corks that caused cork taint; that defendants misrepresented the quality of the corks to induce plaintiff to purchase them; that defendant placed defective products, i.e. products that cause "cork taint," in the stream of commerce; and that defendants made false and misleading statements about their corks in advertising materials. (*See* Compl. ¶¶ 37-76.) Such claims are governed by the forum selection clause, as their resolution "relates to interpretation of the contract," *see Manetti Farrow*, 858 F.2d at 514, and the claims "involve the same operative facts as a parallel claim for breach of contract," *see Lambert v. Kysar*, 983 F.2d at 1121-22.

Accordingly, the forum selection clause is applicable to plaintiff's tort and statutory claims.[8]

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[7] The Court sees no reason to distinguish between tort and statutory claims in this regard.

[8] In light of the Court's ruling that all of the claims alleged in the Complaint are subject to the forum selection clause, and thus subject to dismissal under Rule 12(b)(3), the Court will not address defendants' alternative motion to dismiss under §§ 1404 and 1406.

C. Additional Discovery

Plaintiff argues that, if the Court does not deny defendant's motion, plaintiff should be allowed to conduct additional discovery with respect to a variety of "critical matters." (*See* Opp'n at 19.) Plaintiff, however, has failed to demonstrate how such matters relate to the issue of whether plaintiff's complaint should be dismissed based on the forum selection clause.

Accordingly, the Court denies plaintiff's request to conduct additional discovery.

CONCLUSION

For the reasons stated, defendants' motion to dismiss pursuant to Rule 12(b)(3) is hereby GRANTED and plaintiff's complaint is hereby DISMISSED.

This order closes Docket No. 9.

IT IS SO ORDERED.

Dated: MAR 12 2002

MAXINE M. CHESNEY

United States District Judge

JUDGMENT IN A CIVIL CASE

Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED defendants' motion to dismiss pursuant to Rule 12(b)(3) is hereby GRANTED and plaintiff's complaint is hereby DISMISSED.

MAR 12 2002
Date

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CHATEAU DES CHARMES WINES LTD.,
Plaintiff - Appellant,
v.
SABATE USA, INC., SABATE S.A.,
Defendants - Appellees.

No. 02-15727

D.C. No. CV-01-04203-MMC
Northern District of California,
San Francisco

ORDER

Before: B. FLETCHER, KOZINSKI, and TROTT, Circuit Judges.

The panel has voted to deny the petition for panel rehearing. Judges Kozinski and Trott vote to deny the petition for rehearing en banc and Judge B. Fletcher so recommends.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are denied.

FILED June 26, 2003
Cathy A. Catterson, Clerk
U.S. Court of Appeals

United Nations Convention on Contracts for the International Sale of Goods

Article 4

This Convention governs only the formation of the contract of sale and the rights and obligations of the seller and the buyer arising from such a contract. In particular, except as otherwise expressly provided in this Convention, it is not concerned with:

(a) the validity of the contract or of any of its provisions or of any usage;

(b) the effect which the contract may have on the property in the goods sold.

Article 8

(1) For the purpose of this Convention statements made by and other conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was.

(2) If the preceding paragraph is not applicable, statements made by and other conduct of a party are to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances.

(3) In determining the intent of a party or the understanding a reasonable person would have had, due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties.

Article 9

(1) The parties are bound by any usage to which they have agreed and by any practices which they have established between themselves.

(2) The parties are considered, unless otherwise agreed, to have impliedly made applicable to their contract or its formation a usage of which the parties knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned.

Article 18

(1) A statement made by or other conduct of the offeree indicating assent to an offer is an acceptance. Silence or inactivity does not in itself amount to acceptance.

(2) An acceptance of an offer becomes effective at the moment the indication of assent reaches of offeror. An acceptance is not effective if the indication of assent does not reach the offeror within the time he has fixed or, if no time is fixed, within a reasonable time, due account being taken of the circumstances of the transaction, including the rapidity of the means of communication employed by the offeror. An oral offer must be accepted immediately unless the circumstances indicate otherwise.

(3) However, if, by virtue of the offer or as a result of practices which the parties have established between themselves or of usage, the offeree may indicate assent by performing an act, such as one relating to the dispatch of the goods or payment of the price, without notice to the offeror, the acceptance is effective at the moment the act is performed, provided that the act is performed within the period of time laid down in the preceding paragraph.

Article 19

(1) A reply to an offer which purports to be an acceptance but contains additions, limitations or other modifications is a rejection of the offer and constitutes a counteroffer.

(2) However, a reply to an offer which purports to be an acceptance but contains additional or different terms which

do not materially alter the terms of the offer constitutes an acceptance, unless the offeror, without undue delay, objects orally to the discrepancy or dispatches a notice to that effect. If he does not so object, the terms of the contract are the terms of the offer with the modifications contained in the acceptance.

(3) Additional or different terms relating, among other things, to the price, payment, quality and quantity of the goods, place and time of delivery, extent of one party's liability to the other or the settlement of disputes are considered to alter the terms of the offer materially.

Article 29

(1) A contract may be modified or terminated by mere agreement of the parties.

(2) A contract in writing which contains a provision requiring any modification or termination by agreement to be in writing may not be otherwise modified or terminated by agreement. However, a party may be precluded by his conduct from asserting such a provision to the extent that the other party has relied on that conduct.